United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-1104

United States Court of Appeals

For the Second Circuit

SILVER CHRYSLER PLYMOUTH, INC.,

Plaintiff-Appellee,

against.

CHRYSLER MOTORS CORPORATION and CHRYSLER REALTY CORPORATION,

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF OF DEFENDANTS-APPELLANTS

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Statement

This brief is submitted by defendants-appellants Chrysler Motors Corporation ("Motors") and Chrysler Realty Corporation ("Realty") (hereinafter, sometimes together with their parent Chrysler Corporation, collectively referred to as "Chrysler"), in support of their appeal from the order of the Honorable Jack B. Weinstein of the United States District Court for the Eastern District of New York dated November 26, 1973. That order denied Chrysler's motion to disqualify and enjoin Messrs. Hammond & Schreiber, attorneys for plaintiff-appellee (hereinafter "plaintiff"), from playing any role or participating or assisting plaintiff in this action, and to dismiss the complaint, without prejudice, because of such disqualification. Judge Weinstein's decision is reported at 370 F. Supp. 581 (494a).*

* All page references herein, unless otherwise indicated, refer to pages of the joint appendix.

Briefly, the District Court's decision was based on novel rulings that the Code of Professional Responsibility applies to some attorneys (such as a senior and a "moving force") more than to others while protecting some clients more than others, and that former associates of sizeable law firms should be relieved of ethical obligations towards clients of that firm whom they had represented. The District Court fashioned an unprecedented variable burden of proof for such matters, and held that a client, in order to disqualify a former attorney, had to show on its motion the confidences sought to be preserved, and to identify the specific confidences being misused. In addition, Judge Weinstein, rejecting authority, ruled that the appearance of impropriety and the need to preserve public confidence in the bar were not grounds for disqualification, and that because of newly-conceived anti-trust considerations, certain law firms and clients could no longer rely on well-accepted ethical standards, but would have to withhold and guard client information from associates if they desired to preserve its confidentiality.

The present appeal was noticed by Chrysler on December 21, 1973, after the District Court refused to certify its order for appeal. On January 9, 1974 plaintiff moved to dismiss the appeal (Docket No. 74-1052). That motion was argued before a panel of this Court consisting of Circuit Judges Moore, Friendly and Anderson on January 15, 1974, and it was later referred to this Court *en banc* together with a petition by Chrysler for an extraordinary writ (Docket No. 74-1095). By decision dated April 25, 1974, this Court unanimously denied plaintiff's motion to dismiss the appeal, and dismissed the petition as moot (slip op. 3011).

Statement of the Issues

1. Whether the District Court erred in authorizing Mr. Schreiber and his firm, Hammond & Schreiber, to act as attorneys for a Chrysler dealer suing Chrysler despite

Mr. Schreiber's previous representation of Chrysler in dealer litigation and other related matters, and his employment as an associate in a law firm that has been Chrysler's "Counsel"?

2. Whether the District Court erred in deciding that the application of the standards of professional ethics vary according to the size of the law firm, the age, compensation, and power of an attorney within a law firm, and that certain attorneys should be readily relieved of ethical obligations?

3. Whether the District Court erred in disregarding the established burden of proof in such matters, and in imposing on former clients seeking disqualification the necessity of showing on their motion the confidences they are seeking to protect, and of identifying the specific confidences being misused?

4. Whether the District Court erred in drawing negative inferences from Chrysler's failure to produce records that would reinforce and update the challenged attorneys' knowledge of Chrysler confidences?

5. Whether the District Court erred in ignoring portions of the record, including conceded facts; in utilizing improper, unreliable, inaccurate and irrelevant sources outside the record, without notice to the parties, as a basis for its findings; and in basing findings on such external sources although relevant evidence in the record directly contradicted such sources?

6. Whether the District Court erred in ruling that amorphous anti-trust considerations were sufficient to overcome the ethical considerations of the Code of Professional Responsibility and long-accepted authority as to its application and to reduce the legal profession to the standards of ordinary trade?

Statement of Facts

The facts, simply stated, are that one of the attorneys for plaintiff herein, Dale A. Schreiber, was an attorney actively representing Chrysler interests for several years in numerous matters, including litigation like the present one between a Chrysler automobile dealer and Chrysler. That attorney has now switched sides, is representing a dealer in its suit against Chrysler, and is a member of a firm that specializes in representing dealers in disputes with automobile manufacturers, including Chrysler. Plaintiff's attorneys, from the very beginning of their collaboration, have been utilizing information derived by Mr. Schreiber from work done on Chrysler's behalf. These facts will be explored more fully below.

In this action, plaintiff, a Chrysler dealer, alleges breach of contract and violation by Chrysler of the Dealers' Day In Court Act, 15 U.S.C. §1221, *et seq.* (5a; 9a). In 1968, plaintiff-dealer executed a 5-year written lease for its premises in Port Jefferson, New York (40a) with Chrysler as the lessor. When the term of the initial lease expired, in 1973, Chrysler offered plaintiff a new lease at an increased rent, but plaintiff refused to sign because of claimed oral and written representations by Chrysler to plaintiff and other dealers that the initial lease, contrary to its express terms, would continue in effect for 25 years, and because of language contained in a Dealer Relocation Agreement executed by plaintiff before execution of the initial lease (11a). Plaintiff also bases a claim upon coercion and alleges it was in a "totally subservient relationship" to Chrysler (9a).

Chrysler did not answer the complaint or the interrogatories served by plaintiff. Instead, on August 27, 1973, it moved to disqualify and enjoin plaintiff's attorneys from involvement or assistance in this litigation, and accordingly to dismiss the complaint, requesting as well that the com-

plaint and other papers served by Hammond & Schreiber be stricken and suppressed (26a; 35a-36a).

A. Mr. Schreiber's Exposure to Chrysler Confidences While at Kelley Drye

Dale A. Schreiber, now a member of the firm of Hammond & Schreiber, attorneys for plaintiff herein, was associated with a predecessor of the firm of Kelley Drye Warren Clark Carr & Ellis ("Kelley Drye"), attorneys for Chrysler herein, for almost three years, beginning in August 1965 and ending in February 1969, except for an absence of about nine months (30a). Kelley Drye has acted as attorneys for Chrysler Corporation since 1925 and for many of its subsidiaries and affiliates thereafter. It is, and has been since Mr. Schreiber began working for the firm, "Counsel" to Chrysler (*id.;* 129a; 427a), and has advised and represented Chrysler companies in hundreds of matters affecting virtually every aspect of their operations, activities and plans. Its representation of Chrysler interests has ranged from major stockholder, anti-trust, Dealers' Day In Court Act litigations to warranty litigation, and has encompassed extensive corporate, tax, labor and real estate work, including Chrysler's relationships with automobile dealers, to all of which matters Mr. Schreiber had free and ready access (30a).

During his association with Kelley Drye, Mr. Schreiber was personally engaged in extensive legal work for and representation of Chrysler, and obtained immeasurable confidential information regarding its practices, procedures, methods of operation, activities, contemplated conduct, legal problems and litigations (29a).*

* Realty, as indicated in the complaint herein (7a), is an assignee of certain former rights and agreements of Motors with regard to plaintiff, and while with this firm Mr. Schreiber became involved with real estate work on Motors' behalf, including matters of the type since transferred to Realty. Realty therefore has the same rights as against Mr. Schreiber as has Motors.

Among the matters Mr. Schreiber worked on were suits, like the present one, by automobile dealers against Chrysler, including litigation based, in whole or in part, upon alleged breach of contract or violation of the Dealers' Day In Court Act, which claims are also relied upon by plaintiff in the present action. He thus became familiar with the evidentiary and legal resources available to Chrysler in defending against various claims, and was involved in examining such claims and marshalling Chrysler's defensive resources. Other matters on which Mr. Schreiber was involved, and other matters then handled by Kelley Drye, like the case at bar, related to real estate questions concerning a parcel of land upon which dealership facilities were located and Chrysler's obligations, if any, with respect to dealership premises and even relocations. Still other Chrysler matters on which Mr. Schreiber worked involved the methods of operation and business practices of Chrysler, including relations with Chrysler dealers (30a-31a). It should be noted that Mr. Schreiber was engaged in the representation of Chrysler at the time of the acts complained of in this action (32a).

Some of the confidential information obtained by Mr. Schreiber derived from his conceded contacts with Chrysler personnel engaged in different aspects of Chrysler's operation. For example, Mr. Schreiber met with a Vice President of Chrysler in charge of legal affairs on at least five occasions in connection with Chrysler affairs, and on two of those occasions another member of Chrysler's legal department was present as well. In addition, Mr. Schreiber had contacts with several other Chrysler attorneys and also spoke often with an official of Chrysler Manhattan, a Chrysler-owned dealership in New York City. He conferred as well with the New York Regional Manager of Fleet Sales for Chrysler Motors, and with another Chrysler employee of the same office. He was often in touch with Chrysler employees in the New York regional office, including representatives who were in daily contact with Chrysler dealers (106a-107a; 442a; 68a).

Apart from the many direct contacts with Chrysler personnel, Mr. Schreiber had access to very many Chrysler confidences through both the Kelley Drye files and other attorneys in the firm who were handling Chrysler matters, including dealer litigation and problems related to dealer premises and relocations. As is conceded in papers filed by plaintiff, attorneys in the firm exchanged information and helped one another in handling their various matters. For example, a former associate of Kelley Drye, Clark J. Gurney, in his affidavit submitted by plaintiff, states that he sought Mr. Schreiber's assistance on one Dealers' Day In Court Act case, *DiCarlo* v. *Chrysler Motors Corporation,* and may have spoken to Mr. Schreiber about the *Buono* v. *Chrysler Motors Corporation* case, another suit brought pursuant to that Act (75a-76a). Hugh M. Baum, another former Kelley Drye associate who submitted an affidavit opposing disqualification, concedes that he may have asked for Mr. Schreiber's assistance on the *Chrysler Motors Corporation* v. *Estree Company* case (78a). Similarly, other attorneys at Kelley Drye regularly discussed their work for Chrysler with one another, including Mr. Schreiber (33a; 108a; 119a; 453a-455a).

Associates of Kelley Drye, in handling cases or otherwise assisting clients, were expected to, and did, seek out information from whatever sources were appropriate, including files and employees of the client and the firm's own attorneys and its files, some of the files being from other cases that might have been thought helpful (109a). Partners and associates at that firm were constantly discussing pending cases and exchanging ideas, formally and informally, with both attorneys specifically assigned to the cases and those who were not. Some discussions, for example, took place at meetings of the litigation department, which Mr. Schreiber attended. Obviously, Kelley Drye made every effort to fully acquaint him with the facts of the matters on which he was working, and directed or authorized him to seek further information from the client or sources within Kelley Drye, because his work would

have been of little value if it were based on an incomplete understanding of the facts and their background (105a-106a).

B. Some of the Chrysler Matters of Public Record on Which Mr. Schreiber Worked While at Kelley Drye

Mr. Schreiber's work on Chrysler's behalf encompassed both litigated and non-litigated matters. Since, as plaintiff concedes, Chrysler should not be required to set forth any confidential information on this motion (61a), the discussion that follows must be limited to matters of public record in litigated cases; non-litigated matters, and other material not reflected in public records, are strictly confidential. Since even with respect to lawsuits the public records hardly begin to reflect the matters studied and developed by Mr. Schreiber, and the client confidences to which he was exposed, the cases discussed below represent but the tip of the iceberg of confidential information regarding Chrysler to which Mr. Schreiber was exposed (103a; 449a-450a).

One of the Chrysler dealer matters on which Mr. Schreiber concededly worked at Kelley Drye is *Rocco Motor Sales Corporation* v. *Chrysler Motors Corporation*, a dealer's suit alleging, among other things, breach of contract by Chrysler, and seeking substantial damages. That case also raised questions regarding the dealership's facilities and Chrysler's alleged obligations with respect thereto, as Rocco was seeking as part of the alleged damages its costs with respect to the "maintenance, improvement and operation" of its dealership premises (212a; 213a). Mr. Schreiber admits that he prepared a research memorandum for a successful motion for dismissal (435a); a study of the facts of the case and the allegations made by plaintiff was a prerequisite to his work on the motion. Mr. Schreiber's responsibilities in *Rocco* were recognized at the time, as he was "of counsel" on Chrysler's reply memorandum (484a).

A dealer's case on which Mr. Gurney concedes having sought Mr. Schreiber's assistance, *DiCarlo* v. *Chrysler Motors Corporation* (75a-76a), was a suit based on Motors' alleged coercion and oral and written representations with respect to, among other things, a dealer's relocation from one site to another, in violation of the Dealers' Day In Court Act, analogous to plaintiff's claims herein* (293a). In its answer in *DiCarlo,* Motors, *inter alia,* denied plaintiff's good faith, pleaded the unconstitutionality of the Act, and raised defenses relating to the alleged oral agreement (303a-304a; 307a-308a). Needless to say, those issues, and Chrysler's files, practices and procedures that must be understood in dealing with them, are of obvious relevance in any dealer's suit against Chrysler based upon an oral agreement and relying on that very Act.

Mr. Schreiber also played a role in three other dealer cases (120a-121a). One case was *Bayside Motors, Inc. et al.* v. *Chrysler Corporation, Chrysler Motors Corporation, et al.,* another dealer's suit alleging, *inter alia,* like the case at bar, inequitable conduct in breach of the Dealers' Day In Court Act and breach of contract (220a; 227a, *et seq.*). In their separate answers, Chrysler Corporation and Motors pleaded as affirmative defenses both the invalidity of the Dealers' Day In Court Act, and plaintiff's failure to act in good faith (246a-247a; 252a-253a). In addition, as in *Rocco,* Chrysler's alleged obligations with respect to the dealership premises were at issue; the *Bayside* complaint alleged breach of contract by Chrysler, among other things, in failing to assist the dealer "in effecting an orderly and equitable disposition, by sale or lease" of the dealership premises (231a). A further issue was Chrysler's relations with its dealers generally, as Bayside claimed that Chrysler granted preferential treatment to other dealers (224a-227a).

* The District Court, surprisingly, despite the concession in plaintiff's papers, omitted *DiCarlo* from its most abbreviated discussion of Mr. Schreiber's cases on Chrysler's behalf. Chrysler's arguments that the District Court erroneously overlooked large portions of the record, including conceded facts, and that its findings are not protected by the clearly erroneous rule, appear below at pages 35-39.

While at Kelley Drye, Mr. Schreiber was also involved in a dealer's suit against Chrysler brought by his present partner, Mr. Hammond, to wit, *Long Island Motors, Inc. et al.* v. *Chrysler Motors Corporation and Chrysler Corporation,* an action alleging breach of contract and other matters (254a). Nonetheless, as will be shown below, Mr. Schreiber's collaboration with Mr. Hammond was well under way only one week after discontinuance of that suit. *Long Island* itself focused on Chrysler's relations with its dealers, as plaintiff alleged that Chrysler favored certain dealers over others (256a-262a). Like other dealer's cases, it also raised questions regarding Chrysler's alleged obligations with respect to the dealership premises, plaintiff having claimed "losses and injuries sustained to * * * leasehold improvements, leases, facilities * * * and other losses" (267a).

Apart from the dealers' suits discussed above, Mr. Schreiber was involved in *Chrysler Motors Corporation* v. *Estree Company, et al.* That case involved Motors' attempts to secure premises for dealership use. Motors sought a declaratory judgment and specific performance of its option to lease real estate upon which three dealership premises were located—a Chrysler-Plymouth dealership, a Dodge dealership, and a Chevrolet dealership (271a). The property was intended by Motors for use as "an automobile sales and service establishment" (281a). It is apparent that Chrysler's various policies and practices as lessor of dealership premises would be reflected in that case.*

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* In the District Court, Mr. Schreiber denied having worked on the *Bayside, Long Island* and *Estree* cases. However, there is clear evidence in the record supporting Chrysler's contention that he did (120a-121a), and the District Court's finding in plaintiff's favor resulted from application of erroneous principles of law. See discussions at pages 20-34 hereof. At the very least, those cases were being handled by Kelley Drye during Mr. Schreiber's association, and he must have acquired some knowledge of them through his contacts with Kelley Drye and Chrysler personnel and files. Some of the other Chrysler cases then being handled by Kelley Drye are discussed below.

Mr. Schreiber concedes (62a-63a) that he devoted a great deal of time to several other Chrysler cases, including the *Ezzes* v. *Ackerman* case and *Checker Motors Corp.* v. *Chrysler Motors Corp.* *Ezzes,* a derivative suit, was one of the major Chrysler cases at Kelley Drye at that time, and Mr. Schreiber admits that he "assisted writing briefs on the appeal and a reply brief in the trial court" (63a). *Checker,* another prominent case, was an anti-trust action which involved issues covering many aspects of Chrysler's operations and activities throughout the country, including the nature of Chrysler's relations with its dealers (153a). Checker had alleged, among other things, that Chrysler, "[i]n combination with various of its dealers," engaged in a price fixing scheme by giving cash rebates to purchasers of taxicabs from the dealers (159a). Mr. Schreiber, however, played a major role in Chrysler's convincing the court that the rebate operated without participation of the dealers, who remained free to fix the retail sales price, and in thus overcoming Checker's motions for partial summary judgment and a preliminary injunction (63a; 122a-123a). Mr. Schreiber now takes a contrary position, alleging that the plaintiff-dealer is in a "totally subservient relationship" to Chrysler (9a).

Mr. Schreiber also worked, as he admits, on small warranty cases, suits by car owners and/or dealers against Chrysler, and also through those cases, he became exposed to, and familiar with, many aspects of Chrysler's relations with its dealers. The warranty cases often become suits in which Chrysler and its dealers have adverse interests (123a; 68a).

In summary, with respect to litigated matters, Mr. Schreiber was involved in many dealer cases involving Dealers' Day In Court Act or breach of contract claims, like the case at bar, and involving also Chrysler's alleged obligations to its dealers with respect to dealership premises, as well as Chrysler's attempts to secure premises for a dealership and other landlord-tenant matters. Mr.

Schreiber was further exposed to Chrysler dealer relations through those dealer cases alleging preferential treatment for certain dealers, warranty cases, and the *Checker Motors* case. And through *DiCarlo* he was specifically exposed to questions involving a dealer's relocation and Chrysler's conduct in connection with it, as well as a dealer's reliance upon an oral agreement. It is submitted that information available through these and other cases would be extremely useful to Hammond & Schreiber in prosecuting the case at bar. Indeed they involve the very issues pleaded here.

In addition, as already noted, Mr. Schreiber worked on many confidential Chrysler problems, matters that were not in litigation and often involved giving advice or assistance to Chrysler or preparing for possible transactions or litigations. For example, Chrysler was reviewing and revising some important nationwide programs, and Mr. Schreiber had responsibility for giving advice on the programs directly to Chrysler personnel (110a).

C. Some of the Chrysler Matters Being Handled by Kelley Drye During the Period of Mr. Schreiber's Association

During the period of Mr. Schreiber's association, Kelley Drye handled numerous additional Chrysler matters through which Mr. Schreiber became exposed to Chrysler confidences that could be very helpful to plaintiff in this litigation. Among the Chrysler matters are many dealer's suits apart from those discussed above.* For example, a Dealers' Day In Court Act and breach of contract action which Mr. Gurney states he may have discussed with Mr. Schreiber is *Buono Sales, Inc.* v. *Chrysler Motors Corporation and Chrysler Corporation* (315a). Another dealer's suit being handled by Kelley Drye during Mr. Schreiber's association was *Levenson* v. *Chrysler Corporation and*

* Once again, as in the description of some of Mr. Schreiber's cases, the discussion that follows is limited to matters of public record, and does not enumerate the many other facets of Kelley Drye's work for Chrysler, which were strictly confidential.

Chrysler Motors Corporation, a suit alleging breach of the New York Dealers' Day In Court Act, General Business Law §195, *et seq.,* and breach of contract (337a). In addition, like *Long Island Motors,* the suit raised issues as to Chrysler's relations with its dealers, as plaintiff alleged that Chrysler "refused to give the plaintiffs the same or similar considerations as those given to other dealers" (340a). Other dealers' suits then at Kelley Drye included *Riteway Motors, Inc.* v. *Chrysler Corporation,* an action for substantial damages (347a), and *Young Motors, Inc.* v. *Chrysler Motors Corporation* (351a). Like *Bayside, Long Island* and *Levenson, Young* alleged that Chrysler gave preferential treatment to certain dealers, among other things, in leasing facilities "free to rent or at a rental far below which is charged for like space in that area" (356a).

At the same time, Kelley Drye was actively engaged in handling various Chrysler real estate matters, including several transactions for the leasing of property by Chrysler for sublease to Chrysler dealers, as well as other lease negotiations; landlord-tenant problems, including proceedings for tax reductions; and tax assessments on real property (125a). One case of interest is *Chrysler Motors Corporation* v. *Urban Investing Corporation* (358a), an action growing out of a lease of real property by Motors in order "to construct or cause to be constructed on the demised premises an automobile dealership" (361a). That lease arose out of the same kind of transaction as occurred in this case, *i.e.,* the relocation of a Chrysler dealer (125a). Also of interest is *Chrysler Motors Corporation* v. *RGR Associates,* in which Motors, a lessee of certain premises which it sublet to a Chrysler dealership, sued the landlord to recover the cost of repairing those premises (368a).

During Mr. Schreiber's absence from Kelley Drye, the firm also became involved with dealer relocation problems with regard to two dealerships—Babylon Chrysler Plymouth, Inc. ("Babylon"), and Theodore Chrysler Plymouth, Inc. ("Theodore"). These matters may have been

discussed at the firm after Mr. Schreiber returned to Kelley Drye in the Fall of 1966. With regard to Babylon, Kelley Drye was involved in the process of the dealership's relocation to new premises (127a). Babylon executed a Dealer Relocation Agreement during Mr. Schreiber's association, in October 1965, and subsequently commenced suit against Chrysler in a suit entitled *Babylon Chrysler Plymouth, Inc.* v. *Chrysler Motors Corporation and Chrysler Realty Corporation*, a suit which, like the present one, is based upon a Dealer Relocation Agreement, and alleges an oral agreement to lease real property for a 25-year period (370a; 373a).

With regard to Theodore, a predecessor of plaintiff, Kelley Drye was involved in abortive efforts by Motors to relocate that dealership, then located on the same premises where plaintiff later did business until its relocation in 1968. Chrysler had obtained an option to purchase certain property in Port Jefferson, New York, in order "to erect a new car sales and service agency thereon," and executed a Dealer Relocation Agreement with Theodore for the latter to move to a new facility to be erected thereon. Chrysler subsequently exercised its option but the optionors balked, and Kelley Drye proceeded to commence suit against them for enforcement of the option. That action is entitled *Chrysler Motors Corporation* v. *Wicks* (416a; 417a). Further, it is significant that defendant Realty was organized while Mr. Schreiber was at Kelley Drye. This firm was then involved with Realty's financing and other plans (32a), and became familiar with many aspects of Realty's structure, setup and operations (126a).

In short, it is undeniable that there was a vast amount of confidential information about Chrysler within Kelley Drye, with respect to, among other things, the nature of the entire relationship between Chrysler and its dealers, dealers' suits alleging breach of the Dealers' Day In Court Act, preferential treatment for certain dealers, as well as other matters reflecting Chrysler relocations or attempted

relocations of dealers and its activities as lessor of dealership facilities. In addition, the firm was advising Chrysler in numerous confidential matters encompassing virtually the full range of Chrysler's activities. The District Court specifically found:

> "Undoubtedly, somewhere within the confines of Kelley Drye during the years Schreiber was employed, there existed a great deal of data, obtained confidentially, which could be of some value to any possible future antagonist of Chrysler—including plaintiff in this action. Such confidences would be in the form both of documents and oral information acquired by other members of the firm who had represented Chrysler in various matters." (499a)

D. The Hammond-Schreiber Collaboration and the Utilization of Information Obtained from Kelley Drye

Mr. Schreiber left Kelley Drye in February 1969, while Mr. Hammond's suit against Chrysler, *Long Island Motors*, was still pending. That suit was settled on November 28, 1969 (152a), and one week later, on December 5, 1969, Schreiber and Hammond jointly filed a complaint in the United States District Court for the Southern District of New York in an action entitled *Pearlman* v. *Markin*. In view of the length and complexity of that pleading (134a), Mr. Schreiber's collaboration with Mr. Hammond must have commenced some time earlier—probably no later than November 1969. The partnership of Hammond & Schreiber was formed apparently in August 1970 (57a).

The *Pearlman* complaint was based in large part on information obtained by Mr. Schreiber while representing Chrysler at Kelley Drye. *Pearlman* was a derivative suit against Checker Motors Corporation, one of the named defendants therein (Markin was Checker's president); Checker, of course, was the plaintiff in the *Checker Motors*

Corporation v. *Chrysler Corporation and Chrysler Motors Corporation* suit being handled by Kelley Drye (*supra*, page 11), on which Mr. Schreiber concedes he worked very extensively (62a). Many allegations in the *Pearlman* complaint stem from the work done by Kelley Drye in the *Checker* case, some of which is reflected in papers filed in court. Thus, an analysis of the *Pearlman* pleading (134a) against Chrysler's answer and counterclaim in *Checker* (165a), and an affidavit of Robert Ehrenbard dated October 24, 1967 filed by Kelley Drye in *Checker* (188a), clearly illustrates the free utilization by Mr. Schreiber and Mr. Hammond of information obtained by the former at Kelley Drye while acting on Chrysler's behalf. For example, allegations in the *Pearlman* complaint with respect to Checker's inefficiency and its resulting losses, the inadequacy of its taxicab, and its loss of business because of its officers' offensive behavior, all derive from work done at Kelley Drye on *Checker* (compare 138a-141a with 196a-198a; 143a-145a with 198a-199a; and 145a-146a with 201a-202a), as were comparisons in *Pearlman* of Checker's and Chrysler's manufacturing costs and profits. And the basis of the *Pearlman* judgment according to Mr. Schreiber, the prices at which Checker sold taxicabs to a related company (439a), was itself an issue in Chrysler's counterclaim in *Checker* (172a-184a). A more detailed analysis of *Pearlman's* reliance upon Kelley Drye work and confidential information appears in the appendix at pages 113a-115a and 460a.* Obviously, to discharge his function as Pearlman's attorney, and in the trial of that case, Mr. Schreiber would draw not only on the information in the public record but also all the confidential information gathered from Chrysler relating to the same subjects. Thus, a utilization of the information received by Mr. Schreiber while representing Chrysler was an important element of the Hammond-Schreiber collaboration from its inception.

* During the course of the Pearlman litigation, Hammond & Schreiber with the aid of Mr. Schreiber's knowledge of Chrysler's records in the *Checker* case, subpoenaed those records. While Mr.

E. Mr. Schreiber's Switching of Sides

Mr. Schreiber's collaboration with Mr. Hammond was thus tainted with impropriety from its inception, both because it was based on information obtained from Kelley Drye and because of the pendency of the *Long Island* case. In addition, however, it constituted a dramatic switching of sides by Mr. Schreiber in the midst of a struggle between Chrysler and its dealers, as he chose to join forces with an avowed advocate for Chrysler dealers.

In or about October 1966, just after Mr. Schreiber's return to Kelley Drye, the Metropolitan Independent Dodge Dealers Association was formed in New York for the purpose of pressing disputes with Chrysler (116a-117a; 205a-209a). The questions and potential problems involved in the ensuing struggle were examined by Kelley Drye and were discussed with Chrysler personnel as to possible courses of action that could be taken. As an associate at Kelley Drye familiar with Chrysler-dealer relations, Mr. Schreiber could hardly not have been aware of the growing "Dodge Dealer Rebellion" and of the dealer litigation against Chrysler that followed, most of which was the subject of consultation by Chrysler with that firm (117a).

The "Dodge Dealer Rebellion," with its attendant litigation, has continued through dealer associations ever since, with many attorneys, including Mr. Hammond, a specialist in pressing dealers' claims and counsel to a Chrysler dealer association (497a; 98a), representing the dealers, yet Mr. Schreiber has seen fit to take his confidential knowledge about Chrysler to the opposing camp, and

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Schreiber and Kelley Drye exchanged copies of public records after commencement of *Pearlman*, Mr. Schreiber was never authorized to employ confidential information obtained at Kelley Drye. Chrysler, accordingly, objected to the subpoena, on the primary ground that Mr. Schreiber and therefore his co-counsel were disqualified (204a). Messrs. Hammond & Schreiber did not press for compliance with the subpoena (115a).

to team up with the dealers against the client for whom he formerly worked.* It is of particular interest that all five members of the dealers' steering committee in an Automotive News article dated October 17, 1966 (206a-208a)—Harold Reese, Malcolm (Mel) Davis, Martin Frankel, Erwin Lutzer and Raphael Cohen—are among the dealers who submitted identical affidavits on behalf of Hammond & Schreiber in opposition to Chrysler's motion for disqualification (98a-99a).

In addition, the dealerships headed by five of the dealer affiants in the District Court were plaintiffs in a suit against Motors that Kelley Drye handled while Mr. Schreiber was employed there. The suit is *Ace Dodge, Inc., et al.* v. *New York Region Dodge Advertising Association, Inc.* (210a), and plaintiff concedes that it was brought as part of the "Dodge Dealer Rebellion" (447a). The dealer affiants in the District Court are represented among the plaintiffs in that case as follows: Davis (S&W Sales Co., Inc.), Charles P. Gallagher (Gallagher's Inc.), Frankel (Tremont Dodge, Inc.), Philip P. Buxbaum (Phil's Auto Sales) and Lutzer (Stapleton & Schneider Motors Sales, Inc.).

In short, Mr. Schreiber and the firm of which he is now a partner are representing, in various grievances with Chrysler, the very organizers of, as well as participants in, the "Dodge Dealer Rebellion," which Kelley Drye for almost 2½ years was resisting during Mr. Schreiber's tenure as an attorney for Chrysler.

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* It is revealing that Mr. Gurney claims to have recommended Mr. Schreiber to Mr. Hammond because the latter "might have a use for someone with [Schreiber's] litigation background" (75a). The unique thing about Mr. Schreiber's background that would have interested Mr. Hammond, of course, was the active representation of Chrysler in dealer-related litigation and other matters. The point is that in view of his specialty in pressing dealer claims against automobile manufacturers, including Chrysler, Mr. Hammond should have scrupulously avoided collaborating with a former attorney for Chrysler.

Argument

It is submitted that Mr. Schreiber is disqualified from further participation in this case, and that his disqualification results in the disqualification of his firm, Hammond & Schreiber. Mr. Schreiber's disqualification stems from his own extensive work on Chrysler's behalf and his broad exposure to Chrysler confidences through that work and through his many contacts with Chrysler and Kelley Drye personnel and files. Mr. Schreiber's representation of plaintiff in this case against Chrysler therefore constitutes an actual abuse of confidence, although even if it did not, the potential for, and appearance of, impropriety would themselves be sufficient to constitute a breach of ethics.

The District Court, it is submitted, committed many errors of both law and fact. It incorrectly held, in effect, that professional ethics vary with the size of the client or law firm or the status of the attorney within the firm, that a former associate who did work for a large client may be relieved of ethical obligations, and that amorphous antitrust considerations are a sufficient basis for exempting certain attorneys from the code of ethics. The District Court imposed upon the former client an incorrect and self-defeating burden of proof that would have required Chrysler, on its motion, to reveal the very confidences sought to be preserved. The District Court also made findings that ignored large portions of the record, including conceded facts, and relied upon inaccurate and inapplicable sources outside the record that were directly refuted by Chrysler. Since the motion was decided by the District Court exclusively on affidavits and argument but without a factual hearing, and since the erroneous findings resulted primarily from the application of incorrect legal standards, this Court should find ample bases for disqualification. The District Court also overlooked the fact that an appearance of impropriety in itself is ground for disqualification.

POINT I

Hammond & Schreiber must be disqualified in order to prevent unethical conduct and an abuse of confidence; the District Court's contrary holding was based upon incorrect legal principles and findings in disregard of long-established principles of law as to the application of the canons of ethics, including the standards and burden of proof.

A. The District Court, in turning to the considerations of the marketplace, ignored the applicable presumption and formulated aberrantly variable requirements of proof contrary to precedent and ethical and realistic considerations.

It is submitted that Hammond & Schreiber's representation of a dealer in a suit against Chrysler constitutes a grievous and ongoing breach of Canon 4 of the Code of Professional Responsibility and the Ethical Considerations promulgated thereunder. Canon 4 provides: "A Lawyer Should Preserve the Confidences and Secrets of a Client." Ethical Consideration ("EC") 4-5 states in relevant part:

> "A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes * * *" (footnote omitted)

EC 4-6 further provides that the "obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment." (footnote omitted.)

Just a few months before the District Judge's order of November 26, 1973, the principles governing motions for disqualification of counsel were succinctly enunciated in *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973), where this Court unanimously affirmed a District

Court's order disqualifying an attorney from participating in litigation against a former client. As Chief Judge Kaufman there observed, the very purpose of strictly holding lawyers to "high ethical standards" was to enable a client to discuss problems freely with his attorneys without fear "that information he reveals to his lawyer on one day may be used against him on the next" (478 F.2d at 570-71) (Cf. EC 4-1). A lawyer's good faith is not an adequate safeguard for the former client, since "[e]ven the most rigorous self-discipline might not prevent a lawyer from unconsciously using or manipulating a confidence acquired in the earlier representation and transforming it into a telling advantage in subsequent litigation." (*Id.* at 571). This Court further stated:

> "* * * The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case. These considerations require application of a strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage." (*Id.* at 571).

The law of disqualification is rather simple. When an attorney has or may have been exposed to confidences and secrets of a client, he is disqualified from ever representing an interest adverse to that client if there is any possibility that he may use information he obtained by reason of his former representation. Regardless of whether an attorney can be shown to have actual knowledge of confidential matters, he will be irrebuttably presumed to have knowledge from his prior exposure and access to this information. *Harmar Drive-In Theatre, Inc.* v. *Warner Bros. Pictures, Inc.*, 239 F.2d 555 (2d Cir. 1956), *rehearing denied*, 241 F.2d 937 (2d Cir. 1957); *Laskey Bros. of W. Va.* v. *Warner*

Bros. Pictures, Inc., 224 F.2d 824, 826-27 (2d Cir. 1955); *Motor Mart, Inc.* v. *Saab Motors, Inc.*, 359 F. Supp. 156 (S.D.N.Y. 1973).

The rules stated above apply to all attorneys equally; labels such as "partner" or "associate" are not significant. The exposure of the attorney to confidential information, regardless of his status, mandates his disqualification. *Consolidated Theatres, Inc.* v. *Warner Bros. Circuit Management Corp.*, 216 F.2d 920, 927 (2d Cir. 1954). These principles are designed both to protect the client and to instill public confidence in the legal profession. Thus, traditional rules governing the burden of proof are inapplicable, as the attorney must be disqualified if doubt as to his qualification exists, and the former client does not have to demonstrate explicitly that the former attorney is misusing confidential information. Most significantly, the client will not be required to expose on its motion the very confidences it seeks to protect. *Emle Industries, Inc.* v. *Patentex, Inc., supra*, 478 F.2d at 571; *Chugach Elec. Assoc.* v. *United States District Court*, 370 F.2d 441, 444 (9th Cir. 1966).

Despite these established principles of the law, the District Judge chose to formulate contrary and novel rules for motions to disqualify attorneys and to countenance, apparently out of an anti-monopolistic fervor, the spectacle of an attorney who, having had broad exposure to a client's confidences, switched sides, allied himself with a lawyer who specializes in suing automobile manufacturers including the former client, and then brought suit against the very client whose confidential information he was duty bound to protect.

The nuclear flaw in the District Court's opinion was its viewing of the question of disqualification solely from the attorney's viewpoint, without regard for the interests of the former client and the public, for whose very protection the Code of Professional Responsibility was drafted. One searches the District Court's opinion in vain for ex-

pression of concern or solicitude for Chrysler's or any other client's interest in protecting the confidences reposed in a former attorney. Judge Weinstein's misplaced concern for shielding a young attorney from his former client and from any restrictions on his nascent practice led him to ignore that the Code of Professional Responsibility was designed to protect not the lawyer, but the client and the public—regardless of the client's size or wealth—and was supposed to govern the conduct of all attorneys without regard to their salary, status or experience. The District Judge proceeded to formulate and apply unprecedented and erroneous standards of proof for the disqualification of associates vis-à-vis partners and to compel Chrysler to shoulder the burden of proving specifically that Mr. Schreiber was *actually* misusing confidential information, thereby ignoring the rule that knowledge of a client's confidences is imputed equally to partners and associates in a law firm.

The District Court's disregard for this Court's holding in *Emle* is nowhere more readily apparent than in its discussion of the supposed anti-trust implications of restricting the freedom of young attorneys out of " 'an excess of ethical fervor' ".* In *Emle*, this Court clearly cautioned against "[casting] aside ethical responsibilities out of an excess of anti-monopolistic fervor" (478 F.2d at 575). This Court stated:

> "It is argued that to disqualify Rabin from these actions in an excess of ethical zeal will permit the defendant to monopolize patent counsel. We can only note, however, that it is hardly appropriate to cast aside ethical responsibilities out of an excess of anti-monopolistic fervor. Reduced to basics, *this argument would permit Rabin to represent plaintiffs only by carving out a special exception to the strictures of Canon 4 for situations in which a motion for disqual-*

* As noted at pages 35-39, *infra*, the factual underpinning of the District Court's anti-monopolistic concern was unreliable material outside the record.

> *ification has been made by a large corporate litigant against an attorney who has crossed sides to represent smaller interests. Nothing in the Code of Professional Responsibility or in the teaching of prior cases warrants such ethical relativity.* * * * We have said our duty in this case is owed not only to the parties—who by chance consist of a group of smaller competitors arrayed against the industry giant—but to the public as well." (478 F.2d at 575) (emphasis added).

Judge Weinstein, however, evidently disagreed with *Emle,* and chose "to paraphrase" it so as to turn that decision on its head:

> "We agree, as the Court of Appeals put it, that the courts should be cautious lest they 'cast aside ethical responsibilities out of an excess of antimonopolistic fervor.' *Emle Industries, Inc.* v. *Patentex, Inc.,* 478 F.2d 562, 574 (2d Cir. 1973). But neither should the courts ignore the practical effect of, to paraphrase *Emle,* 'an excess of ethical fervor,' that unnecessarily restricts freedom of attorneys, clients and our system of free enterprise." (504a).

Significantly, the New York Court of Appeals, in *Matter of Lincoln Rochester Trust Company,* —— N.Y.2d ——, —— N.E.2d ——, —— N.Y.S.2d ——, N.Y.L.J., March 29, 1974, at p. 5 (March 27, 1974), recently held that the legal profession was exempt from the state's anti-trust law because of the various elements that distinguish it from a trade or business. Chief among those distinctions were the "code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, [and] a system for discipline of its members for violation of the code of ethics. * * *" N.Y.L.J., March 29, 1974, at p. 5, col. 2. Thus, while Judge Weinstein, in restricting the application of the Canons, relied upon amorphous "[a]ntitrust implications" and pointed to authorities arguing against overly broad restrictions on competition involving other occupations (503a), the truth is that such

anti-monopolistic considerations do not apply to the legal profession precisely because of the ethical code, eroded by Judge Weinstein, which sets the profession apart from other avocations, not subject to such restrictions.

Anti-trust considerations simply do not govern where matters of ethics are involved, and cannot be used to justify creating exceptions to an attorney's ethical responsibilities. The "strict prophylactic rule" of *Emle*, designed to prevent even the slightest possibility of misuse of confidential information (478 F.2d at 571), will become little more than a meaningless generality if exceptions, based upon nebulous theories, are permitted.* Nothing in the Code of Professional Responsibility or in the case law "warrants such ethical relativity." *Emle, supra,* 478 F.2d at 575.

Moreover, Judge Weinstein's evident concern that the effect of his disqualifying Mr. Schreiber would be to disqualify from litigation against Chrysler all former associates of law firms throughout the country that had ever done any work for that company was in no way justified by the facts. Kelley Drye was not any firm doing Chrysler work, nor was Mr. Schreiber any associate with Kelley Drye. As noted above, Kelley Drye has been "Counsel" to Chrysler Corporation and has been so designated on the Chrysler annual reports since Mr. Schreiber came to work with the firm; no other law firm has been so designated (129a; 427a). As "Counsel," Kelley Drye has participated in a far broader scope of Chrysler activities than local attorneys, and has continually received a great deal of confidential information from Chrysler companies on a very wide range of their practices (129a).

Even so, while a former associate of Kelley Drye might not be automatically disqualified if he had never done any work for Chrysler and had never been exposed to Chrysler matters or files, that would not help Mr. Schreiber, who

* Creating exceptions to the "strict prophylactic rule" will undermine this Court's objective in *Emle*: giving attorneys clear guidance on their ethical obligations.

devoted well over 1,000 hours to work on Chrysler matters (122a), wholly apart from any time he might have spent in litigation department and casual conversation about Chrysler with other Kelley Drye attorneys and Chrysler employees. Mr. Schreiber was not an inexperienced junior associate. When he left Kelley Drye he had more than three years of experience and had been given commensurate responsibility by the firm (104a). It is accordingly submitted that on the facts of this case Mr. Schreiber and the firm of which he is a partner must be disqualified, and a holding to that effect would not have the broad monopolistic consequences feared by Judge Weinstein.

The District Court's erroneous focus on the anti-trust laws, rather than on the Code of Professional Responsibility, led it to disregard the well-established principles governing the imputation of knowledge within a law firm, and the basic fact that attorneys in a firm do discuss their cases with one another. *Laskey Bros. of W. Va., Inc.* v. *Warner Bros. Pictures, Inc.*, 224 F.2d 824 (2d Cir. 1955); *W.E. Bassett Co.* v. *H.C. Cook Co.*, 201 F. Supp. 821 (D. Conn.), *aff'd per curiam*, 302 F.2d 268 (2d Cir. 1962).* It has always been the rule that knowledge of a client's confidences is imputed not only to partners in the firm but also to associates and even to law clerks.** As this Court stated in *Consolidated Theatres, Inc.* v. *Warner Bros. Circuit Management Corp.*, 216 F.2d 920 (2d Cir. 1954):

> "Appellant contends that while in the employ of the Dwight firm he was, though admitted to the Bar, a

* In the Court below, the plaintiff did not contest the basic rule that once Mr. Schreiber is found disqualified from participation in this case, the firm of Hammond & Schreiber must be disqualified as well.

** Knowledge of a client's confidence certainly goes beyond even partners and associates. Ethical Consideration 4-2 states: "It is a matter of common knowledge that the normal operations of a law office exposes confidential professional information to non-lawyer employees * * * and those having access to the files * * *." An associate's knowledge and understanding of confidential information, of course, is, and must be presumed, far greater than that of the non-professional staff.

> mere law clerk and that Canon 6 [a predecessor of the present Canon 4] only extends to those attorneys who deal with the client in a face to face relationship or who conduct the trials. The Special Master found that the appellant 'underestimated' his value to the firm and that his real capacity was that of associate counsel. *We do not think that titles have much to do with the real problem here. Canon 6 is devised to protect the secrets and confidences reposed in the attorney by his clients. It is the work done for the client and the access to the confidential information of the client which is crucial in determining whether the obligation of Canon 6 arises.* Regardless of whether Mr. Nickerson, concededly an attorney at law, was a law clerk or not * * * he had access to the files of Fox and of the 'group' and he performed other services for the group —all defendants in the instant case—which might well have brought him into contact with confidential information. That was enough, we hold, to give rise to the obligation of Canon 6." (*Id.* at 927) (emphasis added).

The imputation of knowledge is so strong that it may even reach an associate who never worked himself on the client's behalf. As Chief Judge Kaufman observed in his article "The Former Government Attorney and the Canons of Profesional Ethics", 70 Harv. L. Rev. 657, 662 (1957):

> "Even if an attorney has not received any information from a client and has had no access to files dealing with the client's affairs, he may nevertheless be disqualified if another member of his law firm received confidential information or had access to it. This rule is based on a realistic recognition of the fact that lawyers will generally discuss their cases with other lawyers in the firm. It recognizes that the interests of protecting and maintaining the vital flow of information between attorney and client require that the knowledge of one attorney in an office be imputed to all. The chain of

> imputed knowledge extends not only to the partners in a law firm but to salaried law clerks as well."

See also *United States* v. *Standard Oil Co.*, 136 F. Supp. 345, 360 (S.D.N.Y. 1955).

Despite the abundant authority cited above, however, the District Court chose to apply a clearly different standard of knowledge imputation to the associate as opposed to the partner of a law firm. After concluding that Kelley Drye, during Mr. Schreiber's association, had a great deal of confidential information about Chrysler which could be of value to the plaintiff herein, Judge Weinstein said:

> "Decision turns on whether, in the course of the former 'representation', the associate acquired information reasonably related to the particular subject matter of the subsequent representation. In making this determination the court will assume that a senior partner knows more about what is happening in the firm generally than does a junior associate. Even if this is not true as a matter of fact, the greater responsibilities, freedom of choice in selecting clients, and remuneration of the senior make it fitting that he bear the greater risk of ultimate preclusion from representing a client hostile to one his firm represented. The persuasiveness and detail of the proof required will thus vary inversely with the status of the lawyer in the firm in the prior litigation." (499a-500a).

In stating this, however, the District Judge overlooked the fact that *Laskey* dictates an irrebuttable presumption that Mr. Schreiber obtained knowledge of Chrysler's confidences during his association with Kelley Drye. The presumption was not rebuttable, as Judge Weinstein assumed. A rebuttable presumption is available only to an attorney who is disqualified solely because of his association with another who has been disqualified by reason of his actual exposure and access to client confidences. Cf. *Laskey*, 224 F.2d at 826-827. Mr. Schreiber's disqualification, however,

is not vicarious, but is based upon his own exposure and access to Chrysler files, personnel and information.

Moreover, there could never be any justification for applying a different standard of proof to disqualification of an associate from that of a partner. The reasons given by the District Judge—the greater responsibilities, freedom of choice in selecting clients, and remuneration of the partner —could not justify a bifurcated standard in a matter of ethics since these factors are of little significance to the client or the public, for whose protection the Code was promulgated. An abuse of confidence by a "young talent" (504a) creates as great an erosion of public confidence in the bar as one by a more senior and experienced attorney. A client can hardly be expected to appreciate the distinction between partners and associates where matters of its own confidences are involved, and will undoubtedly "feel that the attorney has escaped [disqualification] on a technicality." *E. F. Hutton & Co.* v. *Brown*, 305 F. Supp. 371, 395 (S.D. Tex. 1969). To suggest that there is, or should be, a difference is to lose sight of the purpose of Canon 4—the protection of the client and the public.

In addition to fashioning a special standard only for associates, the District Court placed the burden of proof on Chrysler to show specifically that Mr. Schreiber was misusing confidential information in the pending litigation. Imposing this burden on Chrysler, of course, would require it not only to fathom and prove the inner workings of Mr. Schreiber's mind, the subconscious as well as the conscious, but also to reveal on this motion, to the extent it could, some of the very information conveyed to him which it now seeks to keep confidential. Obviously, Chrysler is at some handicap in proving all the information that came to Mr. Schreiber's attention, especially as to matters such as files to which he had access and may have examined and casual conversations which would be very difficult, if not impossible, for it to establish. Quite understandably, the law is clearly to the contrary. Thus, in *Richardson* v. *Hamilton*

International Corp., 469 F.2d 1382, 1385 (3d Cir. 1972), the Circuit Court said:

> "The plaintiff contends that it is incumbent on the defendants to come forward with evidence to demonstrate that the previous representation is related to the present representation. The rule, however, is clear that the defendants need not show by direct evidence that [the former associate] acquired information in the course of the previous litigation which is to be used in the pending action. They only need to show that Mr. Richardson *might have* acquired substantially related material." (emphasis added).

Similarly in *Chugach Elec. Assoc.* v. *United States District Court*, 370 F.2d 441, 444 (9th Cir. 1966), the Court observed:

> "The petitioner does not have the burden of specifying the secret and confidential information which was available to [the challenged attorney]. Such specification might entail disclosure of the very confidences the Canons seek to protect. *It must be remembered that the attorney in such situations as this does not have the shelter enjoyed by a defendant whose adversary must meet the burden of proof. Where conflict of interest or abuse of professional confidence is asserted, the right of an attorney freely to practice his profession must, in the public interest, give way in case of doubt.*" (emphasis added).*

Likewise, in *Emle*, this Court said:

> "Moreover, the court need not, indeed cannot, inquire whether the lawyer did, *in fact*, receive confidential information during his previous employment which

* This rule is clearly correct since the former client and the Bar will be severely prejudiced if confidential information is misused, whereas the subsequent client will hardly be prejudiced by disqualification; unless it has become tainted with the confidential information, it will merely have to retain another attorney.

> might be used to the client's disadvantage. Such an inquiry would prove destructive of the weighty policy considerations that serve as the pillars of Canon 4 of the Code, for the client's ultimate and compelled response to an attorney's claim of non-access would necessarily be to describe in detail the confidential information previously disclosed and now sought to be preserved * * *." (478 F.2d at 571) (emphasis in original.)

Accord, *Meyerhofer* v. *Empire Fire & Marine Ins. Co.*, —— F. Supp. ——, 73 Civ. 1940-LFM (S.D.N.Y. August 23, 1973) (printed in the joint appendix at 508a, 513a).

Nonetheless, the District Court chose to fix upon Kelley Drye's failure to produce Mr. Schreiber's time records and proceeded to draw negative inferences, to the effect that Mr. Schreiber had not worked on the *Bayside, Long Island, Estree* and other cases (498a).* In effect, Judge Weinstein would have required the firm to particularize the items of Chrysler confidences communicated to Mr. Schreiber. This

* The time sheets used by the firm are designed not merely to reflect a general category of work done (e.g., litigation, tax, labor, etc.) but its nature, which may involve the person with whom an attorney discussed a particular matter, the focus of the conversation, the issues being considered, the files examined and the papers drafted. *United States* v. *Long*, 328 F. Supp. 233 (E.D. Mo. 1971), cited by the District Court, is thus not in point, since the court there directed the attorney only to give responses "such as 'litigation', 'drafting contracts', 'tax advice' and 'work on domestic relations problems of client'" (*id.* at 236), and expressly excused him from answering questions seeking details as to the nature of the tasks performed.

Thus, drawing negative inferences from Kelley Drye's failure to produce time sheets was in conflict with *Emle's* admonition that a former client need not disclose the very confidences he seeks to protect in order to succeed in disqualifying the attorney. Other cases cited by the District Court—*Case* v. *New York Central R. Co.*, 329 F.2d 936 (2d Cir. 1964); *Matarese* v. *Moore-McCormack*, 158 F.2d 631 (2d Cir. 1946); *Pacific-Atlantic S.S. Co.* v. *United States*, 175 F.2d 632 (4th Cir.), *cert. denied*, 338 U.S. 868 (1949)—are uniformly inapposite. In each of those cases, the burden to produce evidence was on the party against whom the inferences was sought to be drawn, and none involved motions to disqualify an attorney.

Kelley Drye clearly could not do, for it was bound by Canon 4 and could not produce the time sheets. Those records reflect Mr. Schreiber's extensive work on Chrysler matters and numerous contacts with Chrysler and Kelley Drye personnel, and could only serve to refresh his recollection and reinforce his knowledge of confidential information. Moreover, as the case law makes clear, Chrysler had no obligation to detail the confidential information to which Mr. Schreiber was exposed.

Hampered by a contorted standard applicable only to associates, and having misplaced the burden of proof, Judge Weinstein was ineluctably led to disregard the evidence produced by Chrysler of Mr. Schreiber's significant involvement in Chrysler matters. Yet the fact is that Mr. Schreiber spent well over 1,000 hours working on Chrysler matters (122a). He was involved in several cases in which dealers sued Chrysler alleging breach of oral or written agreements, various forms of mistreatment in violation of the Dealers' Day in Court Act, or Chrysler's failure to perform its alleged obligations with respect to dealer facilities or relocations. He was involved as well in other cases raising issues of Chrysler-dealer relations, Chrysler's role as lessor of dealer premises, and Chrysler's defenses against claims of oral agreements by dealers. (*Rocco Motor; DiCarlo; Bayside; Long Island; Checker; Estree;* and the warranty cases). Any Kelley Drye attorney having worked on these cases would necessarily have become familiar with Chrysler's policies, practices and relations with its dealers. Without doubt, possession of such information, as well as information obtained by Mr. Schreiber from his work on non-litigated Chrysler matters, would be a significant advantage to any attorney who pursues a dealer case against Chrysler, especially one like the present alleging coercion of the dealer by Chrysler and breach by Chrysler of representations to this and other dealers.

There were, of course, other dealer cases at Kelley Drye during the time of Mr. Schreiber's association: *Buono*

Sales; Levenson; Riteway Motors; Young Motors. In addition, there were matters that presented questions of dealer relocations, such as *Urban Investing, Babylon* and *Wicks,* and the *RGR* case demonstrated Chrysler's role as lessor of dealership premises. It is apparent that the free flow of information about pending matters at Kelley Drye would have encompassed those cases. Clearly, therefore, Mr. Schreiber had extensive involvement with and access to matters of Chrysler's confidences, involving Chrysler's relations with its dealers and its practices as landlord of dealer premises and otherwise and he now seeks on behalf of plaintiff to present issues not only as to the value of plaintiff's relationship as a dealer to Chrysler but also as to Chrysler's dealings with other dealers.

A case of striking similarity to the case at bar, *Motor Mart, Inc.* v. *Saab Motors, Inc.,* 359 F. Supp. 156 (S.D.N.Y. 1973) (Pollack, J.), demonstrates that an attorney, having had broad exposure to a former client's confidences and having participated on its behalf in a similar type of litigation, must be precluded from representing interests adverse to the client's. There, the challenged attorney had represented Saab Motors, Inc. on a regular basis from 1957 until 1962. During that time he had defended the company in a dealer litigation. Subsequently, the attorney switched sides and was representing a Saab dealer. Saab challenged the attorney because "through such representation as well as through his more general representation, [the attorney] was exposed to and received information on defendant Saab Motors' policies, trade practices, and its methods of operation and procedures which are pertinent to and might be used in the present case. * * *" (359 F. Supp. at 157). Applying the "strict prophylactic rule" of *Emle,* Judge Pollack, on these facts,* directed the disqualification of the attorney.

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* Judge Weinstein, in attempting to distinguish and limit *Saab Motors,* reached beyond Judge Pollack's opinion and suggested that the real basis for the decision were the facts that the attorney allegedly "had drafted the basic dealer agreement used by Saab, in addition to being involved extensively in other aspects of the company's legal relations with its dealers" (501a). In discussing this case, however, Judge

(footnote continued on next page)

The facts of *Saab Motors* are quite close to those of the case at bar. Mr. Schreiber has similarly switched sides to bring against Chrysler a dealer's suit like the ones he was helping Chrysler to resist, and has received extensive information with respect to Chrysler's "policies, trade practices, and its methods of operation and procedures," which certainly would be helpful in the present litigation. Indeed his switching of sides, and his failure to seek or obtain Chrysler's permission for his current representation, are among the factors which distinguish the case at bar from *City of New York* v. *General Motors Corp.*, 60 F.R.D. 393 (S.D.N.Y. 1973), presently on appeal to this Court (Docket No. 73-2351), and underscore the close similarity to *Saab Motors*. The same facts held by Judge Pollack to require disqualification are present here and similarly mandate the disqualification of Hammond & Schreiber.

Finally, it is respectfully submitted that Judge Weinstein's decision seriously threatens the ability of any but the smallest of law firms to represent clients effectively. If former associates are permitted to switch sides and misuse client confidences as sanctioned by Judge Weinstein, all clients of law firms, and the partners as well, will inevitably begin to withhold from associates confidential information that would be needed for effective representation of the clients. Thus, the purpose of the Code of Professional Responsibility to encourage clients to talk freely to their attorneys so as to obtain the best representation (EC 4-1; *Emle, supra,* 478 F.2d at 570-571) will be thwarted unless disqualification is ordered in this case.*

Weinstein evidently engaged in an independent analysis of the law and facts and essentially rewrote the holding of *Saab Motors*. The attorney's alleged drafting of the basic dealer agreement and his extensive involvement with dealer relations were not mentioned by Judge Pollack and, accordingly, his opinion cannot be so limited. However, even as so limited, Mr. Schreiber's involvement here was not really any less broad.

* It is respectfully submitted that in addition to disqualifying Hammond & Schreiber, this Court should enjoin them from playing any role or participating or assisting plaintiff in this action. *Doe* v. *A. Corp.*, 330 F. Supp. 1352 (S.D.N.Y. 1971), *aff'd per curiam sub nom.*

B. The District Court ignored large portions of the record, including conceded facts, and made erroneous findings based on improper, unreliable, inaccurate and irrelevant material from popular books about law firms, outside the record, contradicted by relevant evidence submitted by Chrysler.

The District Court's opinion contained numerous errors in its findings, some of which, as already noted, stemmed from its application of an erroneous burden of proof. In addition, the opinion totally ignored large portions of the record, including many conceded facts. For example, the opinion conveys the impression that Mr. Schreiber was involved, on Chrysler's behalf, in only three significant matters: one dealer case, *Rocco Motor;* a real estate matter, *Polk* v. *Cross & Brown;* and the *Checker Motors* anti-trust suit. This is hardly a fair or correct characterization of the record, however. In fact, Mr. Schreiber concedes that he worked on the *Ezzes, Abikarram* and *Toffany* matters (63a), as well as on numerous warranty cases (68a), in which Chrysler and a dealer are often adversaries (123a). Similarly, Mr. Gurney's affidavit submitted on Mr. Schreiber's behalf shows that the latter did work on the *DiCarlo* case (75a-76a), a Dealers' Day In Court Act litigation involving a dealer's relocation, an alleged oral agreement, and alleged mistreatment by Chrysler of the dealer.

In addition, Judge Weinstein ignored the fact that Chrysler's disclosure of Mr. Schreiber's work was necessarily limited to matters of public record—*i.e.*, cases in litigation—yet Mr. Schreiber also did work for Chrysler on many

Hall v. *A. Corp.*, 453 F.2d 1375 (2d Cir. 1972); *Cord* v. *Smith*, 338 F.2d 516 (9th Cir. 1964). Furthermore, the complaint should be dismissed without prejudice to plaintiff's obtaining new counsel and proceeding, if possible, without benefiting from Chrysler confidences. *Doe* v. *A. Corp., supra; Meyerhofer* v. *Empire Fire & Marine Ins. Co., supra.* In addition, it is submitted that the interrogatories and other papers served by Hammond & Schreiber should be stricken and suppressed lest further proceedings be tainted by the breach of ethics.

non-litigation matters. Those matters, of course, were not disclosed by Chrysler, for it was precisely to preserve their confidentiality that the present motion was made.

Also overlooked by the District Court was the conceded collaboration of Mr. Schreiber and Mr. Hammond in the *Pearlman* case, beginning in about November 1969; despite Mr. Schreiber's concession (437a) and the complaint itself which names them both as counsel (151a), Judge Weinstein's opinion clearly suggests that there was no contact between the two men until August 1970 (497a). Indeed, this is the impression Messrs. Hammond & Schreiber attempted to create initially (57a; 87a), but their lack of candor was exposed by the filed complaint in the *Pearlman* case. This patently erroneous finding clearly reflects the District Court's indifference to the facts of this case.

Apart from ignoring conceded facts, the District Court improperly relied upon inaccurate and irrelevant material outside of the record purporting to describe the practices of large law firms in general, despite the clear and relevant evidence to the contrary submitted by Chrysler. Thus, Judge Weinstein went outside the record to cite and rely upon several works of popular "nonfiction" as authorities on the practice of law in large firms generally. Those works —including, for example, E. O. Smigel, *The Wall Street Lawyer* (1964); M. Mayer, *The Lawyers* (1967); J. C. Goulden, *The Superlawyers* (1972); and P. Hoffman, *Lions in the Street* (1973)—were not cited to the District Court by either party, nor was either party given the opportunity to point out the gross inaccuracies contained therein.

Judge Weinstein relied on apparent statements in those works concerning the claimed size and power of large law firms and their clients generally for his conclusion that disqualification of Mr. Schreiber would constitute an inappropriate restraint-of-trade (502a-504a). He also relied on those works for his conclusion that client confidences within large firms can be successfully insulated from certain at-

torneys (501a); in the process, he overlooked a contrary holding in *W. E. Bassett Co.* v. *H. C. Cook Co.*, 201 F. Supp. 821 (D. Conn. 1961) (Anderson, J.), *aff'd per curiam*, 302 F.2d 268 (2d Cir. 1962), to the effect that the irrebutable presumption of knowledge applied despite careful attempts by a law firm to bifurcate its practice so as to withhold confidences from some of the attorneys.

The point is that the cited books had not been shown to be accurate. On the contrary, they are at best no more than a collection of hearsay heaped upon hearsay, and at worst a collection of non-factual anecdotes.* Moreover, the substantial evidence in the record submitted by the head of Kelley Drye's litigation department, Robert Ehrenbard, and Mr. Schreiber's former fellow associates Messrs. Gurney and Baum, that there existed a steady flow of information within the litigation department of Kelley Drye (33a; 108a-109a; 119a; 453a-455a; 75a-76a; 78a) was ignored by the District Court, which found instead:

> "Their [young associates'] exposure to matters they are not themselves researching is necessarily limited, both by the briefness of their tenure and by their narrow responsibility with respect to the questions they are asked to investigate. Responsibility to protect client's confidences as well as the need to avoid uneconomic duplication of effort will normally restrict internal circulation of information about clients to those with some need to know. These policies tend to limit the exposure of junior associates to client confidences." (501a).

The record does not support that statement, and there is substantial and persuasive evidence to the contrary. But

* For example, on pages 2 and 3 of *Lions in the Street*, the author, speaking of the death of Henry E. Kelley in 1972, states that he was the head of Kelley Drye and one of the leading corporate lawyers in New York. Henry E. Kelley was never the head of Kelley Drye, and he was, primarily, a real estate lawyer. The head of the firm for whom Henry E. Kelley was mistaken was Nicholas Kelley, who had died in 1965.

in any event, there is absolutely nothing in the record to indicate that the general practices thought by the authors of the various cited works to be followed in large law firms generally were followed by Kelley Drye in particular, and Chrysler clearly demonstrated that the opposite was true.

It is respectfully submitted that while the above-cited findings were clearly erroneous and without any basis in the record, this Court has the power to reject those findings even if they were merely incorrect since the "clearly erroneous" rule (Fed. R. Civ. P. Rule 52(a)) is inapplicable. There was no evidentiary hearing before Judge Weinstein. The motion for disqualification was decided strictly on the basis of written affidavits, exhibits and other papers, and a brief oral argument by counsel. No hearing was held, and consequently no sworn testimony was taken.

Rule 52(a) of the Fed. R. Civ. P. on its face applies only to "actions tried upon the facts"—which the motion below was not. Further, Rule 52(a) presupposes a live hearing with witnesses, and the deference given the District Court's findings is predicated upon the assumption that the latter has had the opportunity to observe the demeanor of witnesses and assess their credibility. The Rule does not apply to motions decided entirely on affidavits and other papers, as was Chrysler's motion for disqualification, because this Court is in as good a position to review those papers as was the trial court. This Court has recently so held, in *Dopp* v. *Franklin National Bank*, 461 F.2d 873 (2d Cir. 1972), where Judge (now Chief Judge) Kaufman observed:

> "Our dissenting brother is quick to point out that the district judge's findings 'are not to be disturbed unless found to be clearly erroneous.' This is not a case, however, where there was an evidentiary hearing below and the credibility of witnesses played an essential part in the district judge's determination. We are in as good a position as the district judge to read and interpret the pleadings, affidavits and depositions and

thus have broader discretion on review. *See Concord Fabrics, Inc.* v. *Marcus Brothers Textile Corp.*, 409 F.2d 1315, 1317 (2d Cir. 1969)." 461 F.2d at 879.

Accord, *Orvis* v. *Higgins*, 180 F.2d 537 (2d Cir. 1950); 5A Moore's Federal Practice, para. 52.04, at 2688 (2d ed. 1969).

POINT II

Quite apart from the actual abuse of confidence, the potential for, and appearance of, impropriety in this case in and of themselves constitute a breach of ethics requiring the disqualification of Hammond & Schreiber.

It has been clearly demonstrated above that Hammond & Schreiber's representation of plaintiff in this action creates an actual abuse of confidence. However, quite apart from that actual abuse, disqualification would be essential in this case because of the inescapable potential for, and appearance of, impropriety created by Mr. Schreiber's switching of sides to bring suit on behalf of a dealer against his former client.

The rule barring conduct by an attorney that might create the appearance of impropriety is a fundamental principle of professional ethics. Canon 9 of the Code of Professional Responsibility expressly provides that: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety". Moreover, this Court has recently reaffirmed, in the *Emle Industries, Inc.* v. *Patentex, Inc.* case, *supra*, the independent vitality and significance of an appearance of impropriety as grounds for disqualification. This Court there stated:

> "Nowhere is Shakespeare's observation that 'there is noting either good or bad but thinking makes it so,' more apt than in the realm of ethical considerations. It is for this reason that Canon 9 of the Code of Professional Responsibility cautions that 'A lawyer should

> avoid even the appearance of professional impropriety' and it has been said that a 'lawyer should avoid representation of a party in a suit against a former client, where there may be the appearance of a possible violation of confidence, even though this may not be true in fact.' American Bar Association, Standing Committee on Professional Ethics, Informal Opinion No. 885 (Nov. 2, 1965)." 478 F.2d 562 at 571.
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> * * *
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> "These interests require this court to exercise its leadership to insure that nothing, not even the appearance of impropriety, is permitted to tarnish our judicial process. The stature of the profession and the courts, and the esteem in which they are held, are dependent upon the complete absence of even a semblance of improper conduct." *Id.* at 575.

Accord, *Consolidated Theatres, Inc.* v. *Warner Bros. Circuit Management Corp.*, 216 F.2d 920, 925 (2d Cir. 1954), where this Court, in disqualifying an attorney, said:

> "* * * The fact that information of adverse impact thus received has not been used as yet, or may never be so used, should not obscure [the attorney's] obligation not to accept a retainer such as that covering [this] case."

And in *W. E. Bassett Company* v. *H. C. Cook Company*, 201 F. Supp. 821, 825 (D. Conn. 1961) (Anderson, J.), *aff'd per curiam*, 302 F.2d 268 (2d Cir. 1962), disqualification was ordered despite the absence of actual impropriety, because the circumstances "will inevitably lead to suspicion and distrust in the minds of the defendants and the opportunity for misunderstanding on the part of the public which will lead to a lack of confidence in the bar."

Nor is this Court alone in holding that the appearance of impropriety is itself grounds for disqualification. In *Richardson* v. *Hamilton International Corporation*, 469 F.

2d 1382 (3d Cir. 1972), the Court of Appeals upheld the disqualification of a former associate of a large law firm. The court observed:

> "While we do not doubt that Mr. Richardson acted in good faith and had the best interests of his class at heart when he brought this suit, we do not believe that he should be permitted to place himself in a position where, even unconsciously, he will be tempted, or it appears to the public and his former clients that he might be tempted, in the interests of his new client, to take advantage of information derived from confidences placed in him by Hamilton Life and its officials."
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> * * *
>
> "The courts, as well as the bar, have a responsibility to maintain public confidence in the legal profession. This means that a court may disqualify an attorney for not only acting improperly but also for failing to avoid the appearance of impropriety." 469 F.2d at 1385-1386.

The same result was reached by the Ninth Circuit in *Chugach Elec. Assoc.* v. *United States District Court,* 370 F.2d 441, 442 (9th Cir. 1966), where the court ordered disqualification even though no actual impropriety had been shown. Accord, *Cord* v. *Smith,* 338 F.2d 516, 524 (9th Cir. 1964).

Similarly, in *Motor Mart, Inc.* v. *Saab Motors, Inc.,* 359 F. Supp. 156, 158 (S.D.N.Y. 1973), Judge Pollack held that an appearance of unethical conduct required disqualification:

> "In granting this motion, the Court emphasizes that it has found on the record *no* breach of good conduct by Mr. Mushkin, nor has it found any actual or intended violation by him of the Code of Professional Responsibility. The ruling made is firmly grounded on the potential violation lurking herein and on the

necessity for preserving the appearance of propriety." (emphasis in original).

Accord, *Meyerhofer* v. *Empire Fire and Marine Insurance Company,* —— F.Supp. ——, 73 Civ. 1940-LFM (S.D.N.Y. 1973) (508a), where Judge McMahon, in disqualifying counsel, stated that disqualified counsel had "acted in good faith," but that "in keeping with the 'strict prophylactic rule' of *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973), to protect confidences and to ensure propriety and the appearance of propriety on the part of the bar, we must prevent such conduct as that shown here" (518a). See also *E. F. Hutton & Company* v. *Brown,* 305 F. Supp. 371, 395 (S.D. Texas 1969), where disqualification was ordered, the Court saying that "the receipt of confidential information is not a prerequisite for disqualification"; *Edelman* v. *Levy,* 42 App. Div. 2d 758, 346 N.Y.S.2d 347 (2d Dep't 1973).

Yet despite the abundant authority establishing that disqualification is necessary in this case, the District Court casually repudiated the principle that appearance of impropriety must be avoided (502a). Once again, it is submitted that the District Court's disregard for precedent and lack of concern for preserving public confidence in the legal profession requires a reversal.

Conclusion

Because of the abuse of confidence caused by the present representation of Hammond & Schreiber, as well as the inevitable potential for, and appearance of, impropriety caused thereby, it is respectfully submitted that the order of the District Court dated November 26, 1973 should be reversed with costs. In addition, the firm of Hammond & Schreiber should be disqualified and enjoined from playing any role or participating or assisting plaintiff in this action; the complaint herein should be dismissed, without prejudice, because of such disqualification; the interrogatories and

other papers served by disqualified counsel should be stricken and suppressed; and plaintiff should be barred from utilizing any Chrysler confidential information in this action.

Dated: June 4, 1974

Respectfully submitted,

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